Editor's note: Reconsideration denied by order dated May 10, 1974; Appealed -- aff'd, Civ. No. 74-151 (D.Ariz. July 10, 1975), dismissed, (9th Cir. Jan. 7, 1977)

UNITED STATES
v.
WILLIAM C. KING

IBLA 74-120 Decided April 3, 1974

Appeal from the September 28, 1973, decision of Administrative Law Judge Dean F. Ratzman, declaring the Kelly Placer mining claim null and void. (A-6505.)

Affirmed.

Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

When the Government contests a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

When a government mineral examiner testifies that he has examined the exposed workings on a claim without finding sufficient mineral values to support the discovery of a valuable mineral deposit, a prima facie case of lack of mineral discovery has been made; the Government's mineral examiner is not obliged to explore beyond the current workings of a mining claimant in attempting to verify a discovery.

Mining Claims: Discovery: Generally

Discovery of a valuable mineral deposit has occurred where minerals have been found

> and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellee; William F. Olson, Esq., Bisbee, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

William C. King has appealed from the decision of Administrative Law Judge Dean F. Ratzman in Contest No. A-6505, which declared the Kelly Placer mining claim null and void. The claim was located in 1929 in Cochise County, Arizona, and acquired by William C. King in 1943. Later, the appellant quitclaimed one-fourth interest to Mary A. Wilbanks and one-fourth interest to Joe M. Wilbanks. (Tr. 127.). The Wilbanks were represented by counsel at the contest proceedings but have not joined in this appeal.

The basic issue presented in both the contest proceedings and this appeal is whether a discovery of a valuable mineral deposit has been made within the meaning of the general mining law, the Act of May 10, 1872, as amended, 30 U.S.C. §§ 22 et seq. (1970). That law provides:

> [A]ll valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase * * *.

Since the enactment of that law, the courts and the Department of the Interior have consistently held that to constitute a valid discovery there must be found such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with the reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Cameron v. United States, 252 U.S. 450, 459 (1920); United States v. Iron Silver Mining Co., 128 U.S. 673, 683 (1888); United States v. Zweifel, 11 IBLA 53, 65-66, 80 I.D. 323, 328-29 (1973); Castle v. Womble, 19 L.D. 455, 457 (1894).

The Government's only witness in the contest proceedings was Gilbert J. Matthews, the mineral examiner who had examined the claim and recommended that contest proceedings be initiated. The

mineral examiner, well-qualified by both education and experience (Ex. 1), met with the appellant several times for the purpose of taking samples in order to determine whether a discovery had been made. (Tr. 33, 51, 56-58.) Six of the samples that were taken assayed as follows:

	Sample	Gold Value per cubic yard at $35/oz.
No.	3737	$.5116
	3738	.6621
	3739	.0400
	3740	.0015
	3800	.4309
	3801	.0453

The average value of the gold in all six of the samples is $.28 per cubic yard, assuming a gold price of $35 per ounce. The mineral examiner further testified that since no water is readily available, a relatively inefficient process of separating the gold from the associated material would have to be used. (Tr. 85, 92.) At best, one man could work only one or two yards per day. (Tr. 89-92.) Therefore, the mineral examiner concluded that no discovery had been made on the claim, (Tr. 87), since the return for an entire day of labor would average less than $2.00, even at the higher price which prevailed at the time of the hearing ($63.36 per troy oz.)

The appellant testified that with the expenditure of an additional $7,400 he could assemble "machinery" which would be capable of processing 20 cubic yards of material per day. (Tr. 149-153.) However, he did not show that he could purchase the machinery for the prices suggested in his hypothetical mining operation, nor did he attribute any cost to its operation and maintenance. In addition, his hypothetical mining operation was based on the assumption that sufficient water was available even though he testified that the creek on his claim only ran about every seventh year and the water situation in the area was "critical." (Tr. 142.) The appellant expects to recover $2.00 worth of gold from each cubic yard of screened material actually run through the recovery process (or $1.00 per yard of excavated gravel) and 100 pounds of black sand which he asserts can be sold to smelters in Arizona for $1.00 per pound. (Tr. 169.) Appellant also expects to recover 2 to 6 pounds of titanium per ton of material processed (Ex. C).

The Administrative Law Judge found that the Government had established a prima facie case and that the appellant had failed to show by a preponderance of the evidence that a discovery had

been made. (Dec. at 6.) The Judge suggested that if appellant's assertions had been substantiated, they would point to a discovery. (Dec. at 5.)

The appellant argues that the Government failed to establish a prima facie case and that too much weight was given to the testimony of the government's mineral examiner.

In United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971), we held that:

> Where a Government mineral examiner offers his expert opinion that discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee.

Certainly, the assay reports and the supporting testimony of the mineral examiner were sufficient to support a finding that a prima facie case had been established. Since the testimony of the mineral examiner was supported by reliable, probative evidence, we conclude that it was not given too much weight.

Appellant also asserts that the weight of the evidence was contrary to the decision, partly because his own testimony was not given enough weight. Yet it is clear that the appellant has not met his burden of proof. Once the Government has established a prima facie case of lack of discovery of a valuable mineral deposit, the burden of going forward shifts to the mining claimant to prove by a preponderance of competent evidence that he has made a discovery. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Woolsey, 13 IBLA 120, 122 (1973). It is the claimant who is the proponent of an order to declare his claim valid. Thus, pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion, Foster v. Seaton, supra.

An examination of the record reveals that the appellant's entire line of testimony is based on a hypothesis unsupported by probative evidence. For example, one of the most important assumptions is the existence of sufficient water to conduct the kind of operation contemplated by the appellant. Yet, at the proceedings the appellant testified as follows:

> Well, in my period of time I have lived in that country, I figured the creek ran about every seventh year which makes the water situation quite critical; but you can get wells where these sycamore are growing. That shows the water surfaces. (Tr. 142.)

While it is common knowledge in the West that sycamores and cottonwoods grow near streams or other readily available sources of water, we are not persuaded that their existence alone is probative of the fact that a sufficient quantity of water is available to support a mining operation.

Another assertion advanced by the appellant is that he can recover 100 pounds of black sand from each ton of processed material for which Arizona smelters will pay $1 per pound. (Tr. 169.) The only evidence tendered in support of the entire proposition is one page from "Information Paper 7000" published by the Federal Bureau of Mines in 1938 which states that a cubic yard of gravel may yield up to 100 pounds of black sand. (Ex. 10.) Nowhere is there any evidence that would suggest that appellant could actually recover 100 pounds of black sand from each yard of material, nor is there any evidence that Arizona smelters will pay $1 per pound for the sand. Matthews testified that he didn't believe that black sand was present in marketable quantities. Matthews also tested the black sand for platinum content, with negative results. (Tr. 183.)

The appellant also attacks the calculations of the Government with respect to the value of the gold actually contained in each cubic yard of material. First, he asserts that a cubic yard of material on his claim weighs more than one ton (2,000 lbs.), and may weigh nearly two tons. Therefore he concludes that the gold contained in each cubic yard is actually greater than that shown by the Government's assays. (Ex. C; Appellant's Brief.) Further, he asserts, the price of gold has risen sharply and that should also be taken into account.

Even if we assume that there is twice as much gold in each cubic yard of material as that show by Contestants samples and further assume that gold can be sold for $175 per ounce, the total value of gold in each cubic yard of material on appellant's claim averages only $2.80. That would yield an income of $2.80 to $5.60 per day if appellant could work one or two cubic yards of material

per day. This Board has held that mineral deposits which will yield only meager profits are not valuable within the meaning of the general mining law, since no prudent man would invest in actual operations in those circumstances. United States v. Edwards, 9 IBLA 197, 203 (1973); United States v. Harper, 8 IBLA 357, 369 (1972).

In holding that only meager profits would be realized from a one man operation, we clearly exclude the possibility of a larger operation utilizing more sophisticated equipment, since the appellant has presented no evidence which would tend to corroborate his assertions. Appellant estimates the volume of mineable gravel on the claim at 16,000 cubic yards. We conclude that the evidence tendered by the appellant is not the kind of evidence on which a prudent man could base an informed opinion on the advisability of initiating actual mining operations. Such evidence should be the "kind of evidence on which responsible persons are accustomed to rely in serious affairs." NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir. 1938), cert. denied, 304 U.S. 576 (1938), rev'd on other grounds, 110 F.2d 148 (2d Cir. 1940).

Finally, we note that the appellant has held this claim for more than thirty years with his sale of gold totalling only $100. (Tr. 172.) As the Department stated in United States v. Flurry, A-30887 (March 5, 1968):

> * * * [T]he most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Dean F. Ratzman is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge